



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

January 22, 2003

Ms. Joanna R. Lippman
Fletcher & Springer, L.L.P.
720 Brazos, Suite 1100
Austin, Texas 78701

OR2003-0427

Dear Ms. Lippman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175330.

The Giddings Police Department (the "department"), which you represent, received a request for the "personnel files, records, and any other documents in the possession of the [department]" pertaining to four named police officers. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.1175, 552.119, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that some of the submitted information is not responsive to the instant request for information. We have marked these records, which the department need not release in response to this request.

¹ As you did not submit to this office written comments stating the reasons why section 552.108 would allow the information to be withheld, we find that you have waived this exception. See Gov't Code §§ 552.301, .302; Open Records Decision No. 473 at 2 (1987) (discretionary exceptions under the Public Information Act can be waived).

You assert that some of the records at issue are medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code.² Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the medical records that are subject to the MPA.

Included among the documents you seek to withhold is an accident report form that appears to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. Transp. Code § 550.065(c)(4). Under this provision, the Department of Public Safety (the "DPS") or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the

²Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

statute. *Id.* In the situation at hand, the requestor has not provided the department with two of the three pieces of information. Thus, the department must withhold the accident report under section 550.065(b).

We next note that the submitted documents include information that is subject to section 552.022. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. The information that you submitted to us for review contains a completed evaluation, which falls into one of the categories of information made expressly public by section 552.022. *See* Gov't Code § 552.022(a)(1). Section 552.022(a)(1) states that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it is excepted under section 552.108 of the Government Code or is expressly confidential under other law. As sections 552.101, 552.102, 552.117, 552.1175, 552.119 and 552.130 may protect information deemed confidential by law or the interests of third parties, we will consider the application of those sections both to the information subject to the purview of section 552.022 and to the remaining submitted information.

Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. *Open Records Decision No. 565 (1990)*. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the DPS maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See Open Records Decision No. 565 (1990)*. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under

section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. A portion of the information submitted for our review is CHRI generated by TCIC and NCIC. Accordingly, the information that we have marked is excepted from required public disclosure by section 552.101 in conjunction with section 411.089.

The submitted information contains a Report of Separation of License Holder (F-5) which is made confidential by section 1701.454 of the Occupations Code. Section 1701.454 provides in relevant part:

- (a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.

Occ. Code § 1701.454. The department must withhold the F-5 of the named officer pursuant to Government Code section 552.101 in conjunction with section 1701.454 of the Occupations Code.

The submitted information also contains a declaration of psychological and mental health required by the Texas Commission on Law Enforcement Officer Standards and Education that is confidential pursuant to Section 1701.306 of the Occupations Code. Section 1701.306 provides as follows:

- (a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:
 - (1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and
 - (2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.
- (b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each

declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

Therefore, you must withhold the declaration under section 552.101 in conjunction with section 1701.306. We have marked the document accordingly.

The submitted documents also contain the officers' I-9 and W-4 forms. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The release of submitted I-9 forms in response to this request for information would be "for purposes other than for enforcement" of the referenced federal statutes. A Form I-9 may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system. A W-4 form is confidential under section 6103 of title 26 of the United States Code. Therefore, the department must withhold the I-9 and W-4 forms under section 552.101 of the Government Code in conjunction with federal law.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d at 683-85. Accordingly, we will consider your section 552.101 and section 552.102 claims together.

The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has also determined that common-law privacy protects the following information: the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987); the results of mandatory urine testing, *id.*; illnesses, operations, and physical handicaps of applicants, *id.*; the fact that a person attempted suicide, Open Records Decision No. 422 (1984); the names of parents of victims of sudden infant death syndrome, Attorney General Opinion JM-81; and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress. Open Records Decision No. 343 (1982). This office has found that personal financial information is generally excepted from required public disclosure under common-law privacy. Open Records Decision Nos. 600 (1992), 545 (1990). This office has also ruled, however, that the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). Upon review, we find that portions of the records at issue, which we have marked, contain information that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

The requested records also contain information that is excepted from disclosure under section 552.117(2). Section 552.117(2) excepts from required public disclosure the home address, home telephone number, social security number, and the family member information of peace officers as defined by article 2.12 of the Code of Criminal Procedure. The department must also withhold the officers' *former* home addresses and telephone information from disclosure. *See* Open Records Decision No. 622 (1994). We have marked a representative sample of the information that must be withheld under this exception.

However, some of the peace officers whose personal information is at issue are no longer employed by the department. Furthermore, we are uncertain whether these individuals are still peace officers. If an individual remains a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure, then his information must not be released by the department pursuant to section 552.117(2) of the Government Code. However, if the former peace officer is no longer a licensed peace officer, section 552.117(1) excepts from

disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(1). Information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the employee did not request confidentiality in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, we conclude that the department must withhold information regarding a former peace officer or an employee pursuant to section 552.117(1), if the employee or former officer made a request for confidentiality under section 552.024 of the Government Code prior to the date on which the present request was received by the department.³ We have marked a representative sample of the types of information that the department must withhold under section 552.117(1), if that provision applies.

Regardless of the applicability of section 552.117, a social security number may be excepted from required public disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). It is not apparent to us that any social security number contained in the information at issue was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the department to obtain or maintain a social security number. Therefore, we have no basis for concluding that any social security number in the submitted information was obtained or is maintained pursuant to such a statute and is, therefore, confidential under section 405(c)(2)(C)(vii)(I). We caution the department, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number, the department should ensure that this number was not obtained or is not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

³As section 552.117 is dispositive as to this information, we do not address your section 552.1175 claim.

The submitted information also includes an account number. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The department must, therefore, withhold the marked number under section 552.136.

We further note that section 552.130 of the Government Code excepts from public disclosure information relating to a driver’s license or motor vehicle title or registration issued by an agency of this state. Thus, we have marked the information in the submitted documents that the department must withhold pursuant to section 552.130.⁴

Finally, we observe that the submitted information also contains e-mail addresses obtained from the public. Section 552.137 makes certain e-mail addresses confidential.⁵ Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov’t Code §552.137. However, section 552.137 does not apply to a government employee’s work e-mail address, the general e-mail address of a business, nor to a web site or web page. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The department must, therefore, withhold e-mail addresses of members of the public under section 552.137.

To summarize: (1) medical records may be released only as provided under the MPA; (2) the accident report, CHRI, and the F-5, I-9, and W-4 forms must be withheld under section 552.101; (3) we have marked the declaration of psychological and mental health that must

⁴As section 552.130 is dispositive, we do not address your argument under section 552.119.

⁵The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

be withheld under section 552.101 in conjunction with section 1701.306; (4) we have marked the information that must be withheld under common-law privacy; (5) we have marked the information that must be withheld under section 552.117(2) for individuals who are licensed peace officers; (6) if the individual is an employee or a former employee who is no longer a licensed peace officer, and the employee made a timely request for confidentiality under section 552.024, the department must withhold the marked information pursuant to section 552.117(1) of the Government Code; (7) social security numbers may be confidential under federal law; (8) the marked account number must be withheld under section 552.136; (9) we have marked the information that must be withheld under section 552.130; and (10) the department must withhold e-mail addresses of members of the public under section 552.137. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839.

The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 175330

Enc. Submitted documents

Ms. Joanna R. Lippman - Page 11

**c: Ms. Danalynn Recer
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(w/o enclosures)**